Nos. 85-1658
85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

GROUP W CABLE, INC., *et al.*,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR APPELLEE TAMPA ELECTRIC COMPANY

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit properly found that the Pole Attachment Act of 1978, 47 U.S.C. § 224, which authorizes the permanent physical attachment of cable television equipment to the property of a private utility company, constitutes a taking of the utility company's property, for which just compensation is required?

2. Whether the Eleventh Circuit correctly held the Pole Attachment Act unconstitutional insofar as it authorizes a taking of private property but limits compensation for the taking according to a binding legislative formula, in lieu of the ultimate judicial determination of just compensation required by the fifth amendment to the Constitution?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association, Inc., Cox Cablevision Corporation, Tampa Electric Company,* Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.

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* *Statement pursuant to Sup. Ct. R. 28.1*—Tampa Electric Company and its following affiliates are wholly owned subsidiaries of TECO Energy, Inc.: Tampa Bay Industrial Corporation; TECO Transport and Trade Corporation; Southern Marine Management Company; Gulf Coast Transit Company; GC Services Company, Inc.; Mid-South Towing Company; Electro-Coal Transfer Corporation; TECO Coal Corporation; and Gatliff Coal Company.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a)[1] is reported at 772 F.2d 1537. The memorandum opinions and orders of the Federal Communications Commission and its Common Carrier Bureau (J.S. App. 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985 (J.S. App. 48a-49a), and rehearing was denied on November 12, 1985 (J.S. App. 50a-51a). Notices of appeal were filed on December 10, 1985 (J.S. App. 52a-53a; C.J.S. App. 47a).[2] On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986. The Jurisdictional Statements were filed on that date. Probable jurisdiction was noted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution provides in pertinent part that "private property shall not be taken for public use, without just compensation."

[1] "J.S. App." refers to the appendix to the jurisdictional statement filed by the Federal Communications Commission and the United States of America in No. 85-1658.

[2] "C.J.S. App." refers to the appendix to the jurisdictional statement filed by the Cable Appellants, Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation in No. 85-1660.

The text of the Pole Attachment Act, 47 U.S.C. § 224 (1982 & Supp. III 1985), is set forth at J.S. App. 54a-56a.

COUNTERSTATEMENT OF THE CASE

In these consolidated appeals, the Federal Communications Commission (FCC) and its allied private appellants, Group W Cable, Inc. (Group W), Cox Cablevision Corporation, and the National Cable Television Association, Inc. (collectively, Cable Appellants) seek to overturn the decision of the United States Court of Appeals for the Eleventh Circuit, striking down the Pole Attachment Act (Communications Act Amendments of 1978), as amended, 47 U.S.C. § 224 (1982 & Supp. III 1985), because it effects a taking of private property without just compensation in violation of the fifth amendment to the United States Constitution.

Cable television systems were first developed as a means of extending television service into communities unable to receive television signals because of uneven terrain or distance from television stations.[3] At the outset, cable companies were small, local ventures. They were often owned by rural communities or by television repair shop proprietors. Their primary role was to provide and improve television reception.[4] The first cable television system was established on

[3] Staff of the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess., Telecommunications in Transition: The Status of Competition in the Telecommunications Industry 290, 348 (Comm. Print 1981).

[4] *Id.* at 250.

a noncommercial basis in 1949, with the first commercial system following in 1950.[5]

Due to the FCC's regulatory policies, cable television systems remained largely confined to rural and poor-reception areas through the 1960s and early 1970s. In the mid-seventies, several developments occurred which dramatically accelerated the growth of cable television.[6] With the removal of many of the previous restrictions on the development of the industry, cable television moved into the large (and highly lucrative) urban and suburban markets.[7] At the same time, more and more cable systems were brought under the ownership of huge corporate com-

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[5] H.R. Rep. No. 1635, 89th Cong., 2d Sess. 5 (1966).

[6] In 1976, the FCC permitted the cable systems to choose which television signals they wished to import. This decision allowed them to select signals from stations with the most popular programming. Cable Television Leapfrogging Rules, Report and Order, 57 F.C.C.2d 625 (1976). With the development of low-cost satellite interconnection, several "superstations"—major market independent stations transmitting via satellite—developed. FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, Vol. I, 108 (Final Report) (1980). The opportunity for pay programming networks (and the successful cable television movie networks), many of them fed by satellite, was provided by the *Home Box Office* decision. *Home Box Office Corp. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[7] National Association of Broadcasters, *Great Expectations: A Television Manager's Guide to the Future* 19 (Apr. 1986).

munications enterprises.[8] Cable television is now big business,[9] and immensely profitable.[10]

The cable television industry has employed its increasing profits in an aggressive campaign to obtain favored status from legislative and regulatory bodies. In 1978, after a prolonged and intense lobbying campaign, the cable television interests persuaded Congress to pass the Pole Attachment Act. The Act endowed the FCC with the authority to regulate the rates, terms, and conditions for the attachment of cable television equipment to utility poles that are the property of investor-owned utility companies only (the statute expressly excludes from FCC jurisdiction the

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[8] The top seven cable system operators number their subscribers in the millions and their systems in the hundreds. Three of the systems (including Group W) operate in well over half the states. Leepson, *Cable Television: Coming of Age*, Vol. II, No. 24 Congressional Quarterly Editorial Research Reports 967 (Dec. 27, 1985) [hereinafter cited as "Leepson"].

[9] Group W was recently sold to a consortium of cable communications operators and interests. The cash proceeds from this sale, according to Group W's former parent company, Westinghouse Corporation, were estimated to be approximately $1.6 billion. Westinghouse Electric Corporation Annual Report (Form 10-K) to the Securities and Exchange Commission (Dec. 1985).

[10] The president of United Cable Television Corporation, the eighth-largest cable operator, stated in reference to mature cable television systems: "You open the door Monday morning, and there's a huge pile of cash." *Quoted by* Vamos & Atchison in *Cable TV, Older and Wiser, Looks Like a Good Bet Again*, Business Week, July 22, 1985, at 126, *cited in* Leepson, *supra* note 8. Cable company officials have estimated that a good cable system can attain a 30 to 50 percent operating margin between income and expenses. *Cable Turning Red Ink to Black*, Vol. 17, No. 44 National Journal 2480 (Nov. 2, 1985).

poles owned by municipal and cooperative utility companies). 47 U.S.C. §§ 224(a)(1), (a)(3), (a)(4), and (b)(1). In the Act, Congress stated that the purpose of the FCC's regulation is "to provide that such rates, terms, and conditions are just and reasonable," and prescribed the following formula for the determination of a "just and reasonable" rate:

> [A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1).[11]

Tampa Electric Company is an investor-owned utility (as is Florida Power Corporation), with headquarters in Tampa, Florida, providing electric service to customers in portions of the State of Florida. An investor-owned utility, as distinguished from a municipally or publicly owned utility and from a cooperative or customer-owned utility, is similar to any other private business corporation in that its stock

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[11] This congressionally prescribed formula applied by the FCC to establish the maximum rate for the attachment of cable television equipment to poles owned by investor-owned utilities in practice can be expressed as follows:

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{13.5 \text{ feet}} \times \text{Operating Expenses} + \text{Capital Costs of Poles}$$

and, therefore, the company are owned by private shareholders. The rates, terms, and conditions of the utility service provided by Tampa Electric and Florida Power, supplying electric energy, are subject to regulation by the Public Service Commission of the State of Florida. The rates, terms, and conditions under which Tampa Electric and Florida Power allow cable television operators to attach their equipment to poles owned by the utilities were regulated (until the decision of the Eleventh Circuit) by the FCC under the Pole Attachment Act, as both utilities are investor-owned. Furthermore, the other statutory precondition for FCC regulation of pole attachment rates is also present—the rates are not regulated by the State of Florida. *See* 47 U.S.C. § 224(c)(1). At the request of Group W's predecessor, Teleprompter Corporation, the Supreme Court of Florida held in 1980 that the Florida Public Service Commission does not have jurisdiction to regulate the rates, terms, and conditions of pole attachment agreements. *Teleprompter Corp. v. Hawkins*, 384 So. 2d 648, 649–50 (1980) (citing *Southern Bell Telephone & Telegraph Co.*, 65 P.U.R.3d 117, 119–20 (Fla. Pub. Serv. Comm'n 1966)).[12]

Regulation of cable attachment rates by the FCC under the Pole Attachment Act undoubtedly has exceeded even the fondest hopes of the cable television interests when they entreated Congress for the legislation and opposed pole attachment regulation by the states. *See Teleprompter Corp. v. Hawkins, supra.* The FCC has reduced drastically the pole attachment

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[12] In opposing state regulation of pole attachment rates in this litigation, Teleprompter Corporation was represented by the law firm of Hogan & Hartson, Washington, D.C., along with local counsel. *Teleprompter Corp. v. Hawkins*, 384 So. 2d 648 (1980).

rates agreed to in contracts between the cable companies and investor-owned utilities.[13] In this case, the FCC reduced Florida Power's rates to less than a third of the contract rates. J.S. App. 5a. In fact, the FCC reduced the pole attachment rates agreed to by Group W and Acton CATV below the rates requested by the cable companies. *Id.* at 7a.

The FCC has not confined its largesse to the cable industry to drastic reductions in negotiated pole attachment rates. In the case of *David Bailey d/b/a Port Gibson TV v. Mississippi Power & Light Co.*, FCC Mimeo No. 36118 (Sept. 11, 1985) (*Port Gibson*), the FCC ordered a utility to allow access to its poles for the attachments of a cable operator which had no existing attachments. This order was issued in spite of the fact that the addition of the new cable company would require the utility to replace approximately 50 percent of its poles, and was predicated merely on the fact that another cable company had attachments on the poles. The FCC has neither released the utility from this order for compulsory access, nor disavowed the authority and intention to make additional such orders in the future.

Despite cable television's explosive and ubiquitous growth, tremendous assets, and established profitability, the cable companies claim the stakes involved in these appeals are nothing less than "the economic survival of an important interstate communications

[13] *See, e.g., Telecommunications, Inc. & Community Television Communications v. Mountain States Tel. & Tel.*, PA-82-0023, FCC Mimeo No. 1498 (Dec. 27, 1983) (rate reduced from $4.00 to $.83); *Group W Cable, Inc. v. Lake Superior District Power Co.*, PA-82-0065, FCC Mimeo No. 2839 (Mar. 12, 1984) (rate reduced from $4.00 to $1.11).

service" (Group W Brief at 21) and the very "existence of an independent cable television industry" (Nor-West Cable Communications and Preferred Communications, Inc. Amicus Brief at 3). Actually, the cable companies have enjoyed unprecedented preferential treatment and protection from Congress and the FCC, competitive advantages they wish to perpetuate.

Cable operators enjoy favored treatment under a number of statutes and regulations, including the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (Supp. III 1985) (Cable Act). Section 543 of the Cable Act eliminates onerous rate regulation by local franchising authorities.[14] Cable industry analysts estimate that this portion of the Cable Act will result in an additional $500 million in profits to cable companies by 1990.[15]

Cable's protected status is ironic in view of the fact that most cable operators enjoy a monopoly position with respect to the provision of cable television service in the areas they serve due to their franchise agreements with municipal authorities. As a result of the start-up costs of constructing cable television systems,[16] many markets only attract one operator will-

[14] Under an FCC rule implementing this section of the Cable Act, beginning January 7, 1987, cable operators will be able to establish their own rates for basic service in franchise areas served by a minimum of three broadcast stations. 50 Fed. Reg. 18,637, 18,649 (May 2, 1985), 58 R.R. 2d 1 (1985).

[15] Leepson, *supra*, note 8 (citing Arthur D. Little, Inc., *Prosperity for Cable TV: Outlook 1985-1990* (May 1985)).

[16] *See Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982); *Berkshire Cablevision v. Burke*, 571 F. Supp. 976, 985 (D.R.I. 1983).

ing to provide such a system. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 899–900 (W.D. Mo. 1985) (single cable franchise permissible where the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation). The Cable Act grants cable operators the benefit of a renewal expectation which effectively entitles them to a permanent franchise. 47 U.S.C. § 546.

Despite the cable industry's favored economic and regulatory treatment and the advantage of a monopoly market position, cable companies have shown a propensity to renege on their contractual agreements. Thus, not only have cable operators sought FCC intervention to reduce their negotiated pole attachment rates, they have attempted to restructure to their advantage the terms of their contracts to provide facilities and service in franchise areas across the country.[17]

Cable companies have been permitted to use the private property of others to the benefit of their shareholders. They have sought and obtained pref-

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[17] There have been a number of highly publicized franchise renegotiations, most notably, Warner Amex Cable Communications, which approached officials in Dallas, Milwaukee, and other cities in 1984 and said it would abandon its franchises if the cities did not agree to cutbacks in service. The cities, fearing they would do no better with someone new, acquiesced. Cable systems also have been scaled back in Pittsburgh, Miami, Los Angeles, Denver, Tucson, and Portland, Oregon. Systems partly built or still on the drawing board (including those in Chicago, Washington, D.C., and Philadelphia) also have been delayed while the cable companies try to renegotiate their parts of the bargain. *Cable Turning Red Ink to Black*, *supra* note 10, at 2480.

erential economic regulation despite their monopoly status in many markets. Finally, they have been permitted to renegotiate the terms of, and renege on, their contracts with both private and municipal interests. All of these factors have helped to make the cable industry extremely profitable. Annual revenues of cable operators are expected to double between 1984 and 1990 (to $16.5 billion), and their *profits to triple* (to $1.7 billion).[18]

SUMMARY OF ARGUMENT

The Pole Attachment Act of 1978, 47 U.S.C. § 224, authorizes the permanent physical attachment of cable television equipment to the property of investor-owned utilities. Under the traditional judicial interpretation of the takings clause of the fifth amendment to the Constitution, recently reaffirmed and applied by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (*Loretto*), such governmentally authorized physical occupation of private property unquestionably constitutes a *per se* taking.

The attachment of cable television equipment to privately owned utility poles authorized by the Pole Attachment Act is indistinguishable from the attachment of cable television equipment to privately owned rental property authorized by the New York statute that was found to effect a *per se* taking in *Loretto*. Investor-owned utilities are entitled to the full protection of their private property rights under the fifth amendment against such a taking without the payment of just compensation.

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[18] Solomon, *Cable TV Is at a Crossroads—Trying to Figure Out What It Ought to Be*, Vol. 17, No. 44 National Journal 2478 (Nov. 2, 1985) (citing Little, *supra* note 15).

The FCC does not provide just compensation to utilities for pole attachments, but merely establishes rates according to a binding formula set forth by Congress in the Pole Attachment Act. The Act is therefore unconstitutional since the FCC's determination of maximum pole attachment rates under the binding formula prescribed by Congress fails to provide the ultimate judicial determination of just compensation required by the fifth amendment.

ARGUMENT

I. The Eleventh Circuit Correctly Applied the Traditional Takings Analysis of *Loretto* to the Facts of this Case.

A. The Permanent Physical Occupation of Florida Power's Utility Poles by Cable Television Equipment Constitutes a *Per Se* Taking Under the Rule Reaffirmed in *Loretto*.

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation. From the earliest judicial interpretations of the fifth amendment takings clause, the courts have consistently held that a permanent physical occupation or invasion of private property, authorized by the government, is a taking, without regard to any other factors, *i.e.*, a *per se* taking. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872) (real estate which is "actually invaded" by superinduced additions or by having any artificial structure placed on it is taken within the meaning of the fifth amendment). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); *United States v. Causby*, 328 U.S. 256, 265 (1946); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 100–02 (1893).

In the recent *Loretto* decision, involving facts remarkably similar to the present case,[19] this Court reviewed and reaffirmed the traditional rule that a permanent physical occupation constitutes a *per se* taking of private property. *Loretto* at 434–35. In *Loretto*, this Court held that a New York statute authorizing cable television attachments to apartment buildings effected a taking of the owner's property. The Court had no difficulty in determining that such attachments were within the established *per se* rule:

> Teleprompter's cable installation on appellant's building *constitutes a taking under the traditional test.* The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

Id. at 438 (emphasis added).

The Eleventh Circuit, faced with the same direct physical attachment of "plates, boxes, wires, bolts and screws" to the utility poles owned by Florida Power, found that "*Loretto* and the instant case are virtually indistinguishable" with respect to the nature of the occupation of private property.[20] J.S. App. 14a. Cable

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[19] Not only did *Loretto* also involve the permanent physical attachment of cable television equipment, but the cable operator seeking the attachment was Teleprompter, Group W's predecessor-in-interest.

[20] The District of Columbia Court of Appeals noted that the permanent physical attachment of such cable equipment to utility property was "clearly" a taking under the authority of *Loretto*. *Alabama Power Company v. FCC*, 773 F.2d 362, 367 n.8 (D.C.

attachments of the same character as those at issue in *Loretto* led the Eleventh Circuit to the inescapable conclusion that its decision was controlled by *Loretto*. J.S. App. 14a. Following the traditional analysis, reaffirmed in *Loretto*, that a permanent physical occupation constitutes a *per se* taking, the Eleventh Circuit correctly held that the Pole Attachment Act effects a taking of an investor-owned utility's private property.

Recognizing the vulnerability of their position under the traditional takings analysis applied in *Loretto*, the Cable Appellants attempt to stand takings clause precedent on its head. They argue for the application to the Pole Attachment Act of a construct they describe as the Court's "traditional multifactor balancing test," and they contrast it with the supposedly "unique" and "narrow" holding of *Loretto*. Group W Brief at 24 n.55.

The contention of the Cable Appellants is based on a complete reversal of the history of judicial interpretation of the takings clause. From the earliest cases, there has never been any doubt that a governmentally authorized permanent physical occupation constitutes a taking of private property. *See, e.g., Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540 (1904); *St. Louis v. Western Union Telegraph Co., supra*; *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878). This is the traditional rule, which was reaffirmed and applied in *Loretto*. It is "narrow" or "unique" only in the sense

Cir. 1985) (vacating FCC's decision that pole attachment rates of electric utility companies were excessive; and noting, without reaching the issue, that the physical attachment of cable equipment to the utility poles would be a taking under *Loretto*).

that it applies to that certain class of governmental actions which create permanent physical occupation of property.

Fifth amendment jurisprudence evolved to recognize that the government could effectively take property by actions which do not involve actual physical occupation but which substantially reduce its economic value. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). It was in the context of cases involving this expanded concept of a taking that the Court developed the "multifactor balancing test."[21] However, as the Court indicated in *Loretto*, where the governmental action involves a permanent physical occupation, even a "minor" occupation constitutes a taking, without regard to its economic impact. 458 U.S. at 434-35. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government's physical occupation of mine constituted a *per se* taking even though the mine continued to be operated by, and for the profit of, the original owner).

The permanent physical occupation in the present case is indistinguishable from that adjudicated in *Loretto*. *See infra* at 16-20. Thus, it is a taking *per se*,

[21] Under this analysis, the courts, in determining whether a government regulation or restriction on property constitutes a taking, will balance such factors as the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the governmental action against the public good or benefit to be promoted by the regulation. *Kaiser Aetna v. United States*, 444 U.S. 164. 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

and the multifactor balancing test simply is not implicated. The Eleventh Circuit's conclusion, based on traditional fifth amendment precedent, is not only proper but necessary under the principles of *stare decisis*. The decision should be affirmed.

B. Appellants Have Failed to Distinguish *Loretto*.

Recognizing that the permanent physical occupation of Florida Power's utility poles by cable television equipment is a taking *per se* under the traditional rule reaffirmed by this Court in *Loretto*, appellants try to distinguish this case from *Loretto* by alleging that the occupation is not sufficiently permanent and that Florida Power consented to the occupation under its contracts with the cable operators. The Eleventh Circuit addressed these same arguments, and properly concluded that "the instant case is not distinguishable from *Loretto* on the basis of either uninvited access or permanency of the occupation. *Loretto* therefore controls . . . ." J.S. App. 14a.

Appellants argue that *Loretto* is inapplicable because the invasion or occupation is not permanent inasmuch as Florida Power's contracts with the cable operators contain provisions allowing the utility to reclaim pole space occupied by cable attachments if needed for utility service. Government Brief at 18; Group W Brief at 25–26. This argument assumes that the FCC would allow Florida Power to refuse the cable companies continued access according to the terms of the pole attachment contracts, an assumption which the Eleventh Circuit found ignores "the hard reality of the matter." J.S. App. 11a. The "hard reality" referred to by the Eleventh Circuit is the fact that the FCC has consistently refused to allow utilities to discontinue pole attachments according to

their contractual rights—even when the utilities' attempts to do so are based on breaches of the contracts by the cable companies, such as placing unsafe and unauthorized attachments on the poles.[22]

In light of the FCC's established practice of staying every attempt by a utility to disconnect cable attachments for any reason as "retaliatory," the Eleventh Circuit found that Florida Power in fact is "powerless to," exclude the cable companies from its poles. J.S. App. 12a. The government has failed to provide any indication that "Florida Power, or any utility for that matter, could issue a disconnect order under such circumstances and have it escape being deemed retaliatory by the FCC." J.S. App. 12a n.4. Based on the reality of the FCC's implacable hostility to disconnection requests by utilities, which the agency has neither denied nor promised to abandon, the Eleventh Circuit quite appropriately rejected the argument that the theoretical possibility of disconnection under the

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[22] *Whitney Cablevision v. Southern Indiana Gas & Elec. Co.*, FCC Mimeo No. 841 (Nov. 16, 1984) (Utility attempted to exclude cable company by ordering it to remove its property because of unauthorized and unsafe pole attachments which breached the parties' contract. FCC stayed the utility's efforts to remove the equipment after determining that the cable company was "reasonably likely to show" that the attempted termination was motivated by the utility's wish to avoid pole attachment rate regulation); *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, FCC Mimeo No. 3994 (Apr. 19, 1985) (FCC superseded its previous grant of a temporary stay with a final order preventing the utility from terminating the pole agreement despite the utility's reliance on numerous safety violations and unauthorized attachments by the cable operator as justification for the termination and the utility's provision of six months' notice of termination).

terms of Florida Power's contracts,[23] rendered the cable attachments less permanent than those in *Loretto*.[24]

The Eleventh Circuit also properly rebuffed appellants' attempt to distinguish *Loretto* on the theory that cable access to Florida Power's poles was granted voluntarily by contract rather than authorized by the government. As an initial matter, the existence of a contract for access is not even a factual distinction between the two cases since the original cable attachment to the apartment building in *Loretto* occurred pursuant to such a contract. 458 U.S. at 421–22. Furthermore, the Eleventh Circuit correctly found that the original "invitation" for the cable companies to have access to Florida Power's poles "was made subject to and based upon certain conditions, namely the agreed-upon annual per pole rate." J.S. App. 10a–11a. Thus, although the cable companies "may have been invited at the outset, *they certainly weren't invited at the rate imposed by the FCC.*" *Id.*

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[23] Furthermore, in *Loretto*, the Court specifically noted that leaving a property owner with only the right to exclude—out of all his bundle of property rights—under the condition he uses the property in one particular manner, does not negate the property owner's right to compensation for the physical occupation. *Loretto*, 458 U.S. 419, 439 n.17.

[24] Actually, the Eleventh Circuit concluded that "the extent of occupation in [this case] not only satisfies *Loretto*'s permanency requirement, but significantly exceeds it," *Florida Power Corp. v. FCC* (J.S. App. 13a), because, while the property owner in *Loretto* could force the cable company to disconnect, Florida Power would most likely not be permitted to do so. "It is apparent from *Loretto* that when the Court speaks in terms of a permanent physical occupation, it does not necessarily mean that the occupation is one which will last forever." *Id.*

(emphasis added). It is hornbook law that a property owner's consent for a stranger to enter his property subject to a condition or limited authorization does not imply continued consent if the condition is not met or the limitations on the authorization are exceeded. *See* Restatement (Second) of Torts § 168 (1965).

The FCC's orders, which required the attachment of the cable operator's equipment to Florida Power's poles at one-third the contract price, effectively nullified the condition (payment of the agreed upon rates) under which the cable operators were originally permitted access to Florida Power's property. The cable companies, having exceeded the limitation placed upon their invited entry, are no less trespassers than if they had entered upon the property with no authorization at all. "[B]y insisting on a significantly lower rate [than the one agreed to], the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to *that of an unwanted guest*." J.S. App. 9a (emphasis added).

The appellants draw another meaningless distinction between the New York statute in *Loretto*, which contains language prohibiting landlords from interfering with cable attachments, and the Pole Attachment Act, which does not include a provision specifically ordering utilities to allow cable attachments. Government Brief at 14; Group W Brief at 28. This argument both ignores the actual effect of the FCC's regulation under the Pole Attachment Act, and is disingenuous, particularly on the part of the government, in light of the FCC's interpretation of its authority under the Act. The FCC's pole attachment rate orders, combined with the agency's refusal

to allow disconnection for any reason, mandate continued occupation of utility property by cable companies for compensation far less than provided in the contracts under which the occupation began. Furthermore, in the *Port Gibson* case, which the government barely deigns to mention (Government Brief at 17 n.21), the FCC has asserted authority under the Pole Attachment Act to require initial access by a cable company to utility poles merely because another cable company has been allowed access. *Port Gibson*, FCC Mimeo No. 36118 (Sept. 11, 1985).

C. Investor-Owned Utilities Are Entitled to Full Constitutional Protection of Their Property Rights Under the Fifth Amendment.

In addition to realleging the same theories for distinguishing *Loretto* rejected by the Eleventh Circuit, appellants now attempt to carve out of the fifth amendment property guarantees a "regulated industry" or "utility" exception. Government Brief at 14; Group W Brief at 22 & n.51. The argument for such an exception is contrary to the precedent of this Court, a fact which the appellants attempt to avoid by misapplying cases which arose in very different contexts and involved distinct legal principles from the case at bar.

In construing the fifth amendment rights of public utilities (and highly regulated industries, *e.g.*, the railroads), the courts have held uniformly through the years that these industries enjoy full constitutional protection against the taking of their private property without just compensation. In 1904, this Court rejected the argument that a railroad company could not exclude a telegraph company's poles from the railroad right-of-way because the property was devoted to a public service and subject to government regulation. *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 573 (1904). The Court succinctly articulated the principle that a private business which engages in a regulated public service does not thereby forfeit the protection of the fifth amendment:

> The right-of-way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control; and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right-of-way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation.

Id.

The fact that Florida Power's utility poles are dedicated to the provision of electric service to the public and that the rates for such service are regulated by the Florida Public Service Commission[25] does not subject the poles to an uncompensated taking for cable television attachments.[26] Thus, in a case where a town

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[25] The appellants claim that Florida Power is subject to regulation, and, therefore, enjoys fewer fifth amendment rights than the property owner in *Loretto*. In *Loretto*, the cable operators argued that Ms. Loretto was subject to extensive regulation as a landlord, thus *less than fully protected* under the fifth amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439-40 (1982).

[26] That Florida Power enjoys full fifth amendment rights in

had allegedly exercised its police power to declare part of a railroad's driveway a taxicab stand, this Court held that just compensation to the railroad must be paid by the town for its use of the railroad's private property. *Delaware, Lackawanna & Western Railroad Co. v. Town of Morristown*, 276 U.S. 182 (1928). "The railroad grounds, station, platforms, driveways, etc., are used by the [railroad] for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the *property used belongs to the* [*railroad*]. The state may not require *it to be used in that business, or take it for another public use, without just compensation* . . . ." *Id.* at 193 (citations omitted) (emphasis added).

The Cable Appellants concede, as they must, that some "[u]tility property can be the subject of an unconstitutional taking," *e.g.*, a utility's office building. Group W Brief at 22 n.51. These appellants thereby suggest that investor-owned utilities enjoy fifth

its utility poles is highlighted by a related line of cases which have analyzed whether a utility's ratepayers have any interest in the utility's "devoted-to-public-use" property. The decisions have consistently held that, by paying bills for service, utility customers do not acquire any interest, legal or equitable, in the property purchased by the utility for the conduct of its business. "Customers pay for service, not for the property used to render it." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 32 (1926). *See Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm'n*, 58 Pa. Commw. 272, 427 A.2d 1244, 1246-47 (1981) (ratepayers do not gain any interest in assets from sale of land held by utility); *Boise Water Corp. v. Idaho Pub. Util. Comm'n*, 99 Idaho 158, 578 P.2d 1089 (1978) (same). Ratepayers do not gain any interest in the utilities' "public use" property because it is the utilities' *private* property, protected by the full panoply of fifth amendment guarantees.

amendment guarantees with respect to only certain property. The speciousness of the attempted distinction is illustrated by the following example: It is very possible that a cable operator would decide to attach its cable equipment to a utility's *office building* as a means of continuing its cable path. Such a situation is hardly a mere hypothesis in light of Teleprompter's insistence on attaching to Ms. Loretto's apartment building. Although the Cable Appellants have suggested that a utility's office building is entitled to greater fifth amendment protection than its poles, there can be no doubt that, should the occasion present itself, the cable companies would claim that Congress could enact a statute authorizing the attachment of cable equipment to a utility's building without just compensation. The only apparent basis of distinction by the cable industry between property which enjoys constitutional protection and property which does not is whether the property is a present candidate for the installation of cable equipment.[27]

[27] Cable Appellants attempt to distinguish between a utility's poles and its other property by asserting that the poles are an "unintended bottleneck to the provision of cable services." Group W Brief at 22. The bottleneck doctrine is a principle of antitrust law, and is irrelevant to fifth amendment takings analysis. The so-called "interconnection" cases—which deal with this essential facilities doctrine of antitrust law—provide no support for appellants' argument. The essential business facility or "bottleneck" doctrine provides that "a business or group of businesses which controls a scarce facility has an obligation to give *competitors* reasonable access to it." *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979) (emphasis added). *See MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (listing four elements necessary to establish antitrust liability under the doctrine), *cert. denied*, 464 U.S. 891 (1984). Regulation of bottleneck facilities, including the

Grasping for a distinguishing factor, appellants attempt to characterize this case as one involving the "commonplace regulation of utility property," (Group W Brief at 18), and Florida Power's efforts to vindicate its fifth amendment property rights as simply "assert[ing] the 'right' to be free from regulation" of the rates it charges for attachment of cable television equipment and wires to its utility poles. Government Brief at 14-15. Appellants' arguments are based on the erroneous premise that this case involves only the regulation or restriction on the *use* of property, instead of an actual physical occupation.[28]

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ordering of physical interconnections between a bottleneck facility and another service system, has been developed to foster competition between service providers and prevent antitrust violations. Florida Power and the cable companies provide different services and products. Indeed, at the insistence of Group W's predecessor, Teleprompter, the Florida Supreme Court held that the Public Service Commission, which regulates Tampa Electric and Florida Power, could not regulate pole attachment agreements because the Commission did not have statutory authority over the cable television industry. *Teleprompter Corp. v. Hawkins*, 384 So. 2d at 649-50 (citing *Southern Bell Tel. & Tel. Co.*, 65 P.U.R.3d 117, 119-20 (Fla. Pub. Serv. Comm'n 1966)). The utilities are not "competitors" of cable television companies, and cannot be compelled under the essential facilities doctrine to yield their private property for attachment or interconnection by the cable companies. Florida Power's poles are not a "bottleneck" in terms of this specific antitrust doctrine, but only in the legally irrelevant sense that the cable companies find it convenient to occupy them.

[28] Thus, *Munn v. Illinois*, 94 U.S. 113 (1877); *Nebbia v. New York*, 291 U.S. 502 (1934); *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662 (1935); and *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287 (1933) are all regulatory ratemaking cases, while *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951) involved discontinuance of railroad

The proposition that Florida Power's status as a regulated electric utility does not diminish its fifth amendment property rights is supported by this Court's recent decision in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 106 S. Ct. 903 (1986), striking down a requirement that the utility allow third parties to place messages in its billing envelopes. The Court rejected arguments that regulation of utility service circumscribes an investor-owned utility's first amendment right to be free of government restriction on its speech or its fifth amendment right to be free of government confiscation of its private property interest in billing envelopes. *Id.* at 912.

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service. In none of these cases was a *permanent physical* occupation of property at issue. For example, in *Munn*, this Court stated that the elevator owner could free himself from the regulatory rates and charges pertaining to storage of grain by "discontinuing the use" of the grain elevators. 94 U.S. at 126. The owner was subject to regulation by the public only so long as he devoted his property to a "public use." *Id. See also Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920); *Wilson v. New*, 243 U.S. 332, 384-85 (1917) (Pitney, J., dissenting). The FCC's decisions clearly show that it will not allow Florida Power to simply "discontinue its use" of renting pole space to the cable operators to attach their equipment. The FCC routinely grants stays—temporary and permanent—to preclude the utility companies from discontinuing or excluding the cable companies from their poles. *See* note 22, *supra*. The legislative history of the Pole Attachment Act also indicates that the utilities cannot avoid cable attachments merely by withdrawing the "use" of their property. The Committee Report expressed the view that a utility might conceivably wish to discontinue or withdraw from an agreement "simply in order to avoid FCC regulation," and that the FCC might properly find such conduct unjust and unreasonable. S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess. 109, 124.

The real essence of appellants' position is that the taking of Florida Power's property is justified because it helps promote the growth and availability of cable television, which is claimed to be in the public interest and benefit. Such public benefit, however, while it may *justify* the taking, does not alter the confiscatory nature of the governmental action. Nor does service of the public interest excuse the payment of just compensation for such a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922). Social utility merely satisfies that part of the takings clause which requires that the exercise of the power of expropriation be for a "public use."

The appellants also argue for a utility exception to the fifth amendment with the assertion that a utility need not be compensated for the use of its property by cable companies since electric ratepayers will provide a return on the investment in that property anyway. Government Brief at 11; Group W Brief at 7. The essential unfairness and illogic of this cavalier treatment of the private property rights of utilities and the interests of their ratepayers was exposed by the Fifth Circuit:

> Texas Power is indeed performing its responsibility to its utility users by minimizing their rates to the extent that other enterprises benefit from the use of property that is in effect paid for by utility users. The question is not, as Group W puts it, how much cable should subsidize Texas Power but how much cable and cable subscribers may benefit from the use of Texas Power's property without reimbursing that company.

Texas Power & Light Co. v. FCC, 784 F.2d 1265, 1272 (5th Cir. 1986).

The permanent physical occupation of Florida Power's utility poles by cable television equipment, authorized by the FCC under the Pole Attachment Act, effected a taking *per se* under the traditional rule recently reaffirmed in *Loretto*. Just compensation to Florida Power for this taking is required by the fifth amendment.

II. The Pole Attachment Act Is Unconstitutional Because It Limits Compensation for the Taking of Utility Property According to a Binding Congressional Formula.

The appellants mischaracterize the Eleventh Circuit's decision as standing for the proposition that an administrative agency may never determine just compensation in the first instance. Government Brief at 23 n.30; Group W Brief at 35. Fairly read in the context of the Pole Attachment Act, the Eleventh Circuit's opinion states the more limited holding that the FCC's regulation of pole attachment rates *pursuant to a binding rule established by Congress* offends the Constitution by imposing a legislative limit on just compensation, which must be determined ultimately by the judiciary. This element of the Eleventh Circuit's decision is not a novelty, as caricatured by the appellants, but follows established precedent.

A. A Legislative Limit on Just Compensation Violates the Constitutional Separation of Powers.

Congress cannot, without violating the Constitution, limit the scope of the inquiry into the appropriate measure of just compensation for a taking of private property, an issue which the Constitution entrusts to

the judiciary for ultimate determination. "As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment." *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 364-65 (1936); *accord American-Hawaiian Steamship Co. v. United States*, 129 Ct. Cl. 365, 369-71, 124 F. Supp. 378, 382-83 (1954), *cert. denied*, 350 U.S. 863 (1955). *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (it does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation). In deference to this precedent, even the government has admitted the continuing force of case law holding that the courts have the ultimate responsibility to determine whether the compensation provided is constitutionally adequate and that the courts' inquiry may not be circumscribed by Congress. Government Brief at 25.

The FCC establishes maximum pole attachment rates according to the formula prescribed in the Pole Attachment Act. *See supra* at 5-7. The formula operates as a statutory limit on the compensation provided to utilities. This regulatory scheme effectively renders Congress judge of the amount of compensation it will pay for its own taking of private property.

Such a combination of legislative and judicial functions in the Congress transgresses the basic constitutional separation of powers. The separation of powers lies "at the heart of the Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976), and is embodied

in its "very structure." *INS v. Chadha*, 462 U.S. 919, 946 (1983). The continued viability and importance of this fundamental premise of our democracy was recently affirmed by this Court's decision in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), which declared the "Gramm-Rudman-Hollings Act" unconstitutional.

The Pole Attachment Act deprives Florida Power of any opportunity to have a determination made—by an unfettered judicial inquiry—as to what constitutes just compensation. Instead, the compensation is limited by the statutory formula enacted in the Pole Attachment Act. The Eleventh Circuit thus quite properly invalidated the FCC's pole attachment ratemaking under the statutory formula as inconsistent with the constitutionally mandated division of responsibility for the decision of *what* private property need be taken for the public use (a legislative function) and for the determination of the award and amount of just compensation for that taking (a judicial function).

B. The Opportunity for Limited Appellate Review of Pole Attachment Rate Orders Does Not Satisfy the Constitution.

Appellants assert that FCC ratemaking under the Pole Attachment Act satisfies the constitutional requirement for an ultimate judicial determination of just compensation based on the availability of judicial review of the administrative action. Government Brief at 22, 25-29; Group W Brief at 31. Appellate review of the FCC's application of a statutory formula, which does not even purport to provide just compensation for a taking under any traditional measure, falls far short of providing the necessary judicial determination.

Appellate review of FCC pole attachment rate orders under the Administrative Procedure Act (5 U.S.C. § 706) is limited to consideration of the record developed before the Commission.[29] The administrative record in pole attachment proceedings only contains evidence which the FCC deems relevant to its

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[29] "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 105 S. Ct. 1598, 1607 (1985). The government now asserts that the Pole Attachment Act can be saved by the theoretical ability of an appellate court to receive evidence outside the administrative record concerning just compensation. Government Brief at 28. The government has not cited an instance in which an appellate court has invoked such a procedure. The cases and the statutory provision cited by the government do not stand for the proposition that an appellate court itself will take evidence in reviewing administrative action, but for the very different proposition that an inadequate administrative record may be supplemented by a remand to the agency, or in unusual circumstances to a district court, for further fact-finding. The unconstitutional limitation on compensation for a taking imposed by the Pole Attachment Act's formula cannot be cured by forcing utilities to litigate every pole attachment rate case in a constitutionally deficient proceeding before the FCC, governed by the formula, and then to hope to persuade an appellate court to order the FCC or a district court to conduct a proper inquiry into the amount of just compensation, contrary to the language and intent of the statute, which would then be subject to further appellate review. An unconstitutional statute is not properly preserved by the judicial addition of elements not stated, intended, or envisioned by the legislature. *See United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952) (the judicial function is to apply statutes on the basis of what Congress has written, not what Congress might have written); *accord 62 Cases, Etc., of Jam v. United States*, 340 U.S. 593, 596 (1951) (Congress expresses its purpose by words. It is for the courts to ascertain—not to add nor to subtract, not to delete nor to distort).

application of the statutory formula in the Act. *See* 47 C.F.R. § 1.407 (1985). This statutory formula (*see supra* at 6 & n.11) does not even purport to establish just compensation for a taking of private property; it merely constitutes the Congressional prescription for "just and reasonable" pole attachment rates. 47 U.S.C. §§ 224(b), (d).

As the administrative record in pole attachment proceedings is limited to the evidence viewed by the FCC as necessary to the application of the Act's statutory formula for "just and reasonable" rates, evidence of other factors which may be relevant to the determination of just compensation, such as fair market value, does not come before the reviewing court.[30] Appellate review of such a narrowly constricted record fails to permit the judicial inquiry into just compensation mandated by the Constitution.

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[30] *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984) (fair market value will in most cases be the measure for "just compensation"; other measures used only when fair market value is too difficult to ascertain or its application would work an injustice to owner or public), 467 U.S. at 10 & n.14; *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 126 (1950) (current or fair market value has normally been accepted as a just standard for a rule to determine just compensation); *United States v. Miller*, 317 U.S. 369, 374 (1943) (where property has no current "market," and thus no market value, resort must be had to other data to ascertain its value); *United States v. 320.0 Acres of Land, More or Less*, 605 F.2d 762, 781 (5th Cir. 1979) (fair market value is one standard for determining what compensation is "just" both to the owner whose property is taken and to the public that pays the bill).

CONCLUSION

Tampa Electric Company respectfully submits that the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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